

# Exhibit R

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 1:20-cv-03010-APM

HON. AMIT P. MEHTA

[REDACTED]

STATE OF COLORADO, *et al.*

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 1:20-cv-03715-APM

HON. AMIT P. MEHTA

[REDACTED]

**PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW**

February 9, 2024

*v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) (quoting *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997)). Evidence of some substitution between two products does not require both products to be in a relevant product market. *See H & R Block*, 833 F. Supp. at 54 (“[W]hile providers of all tax preparation methods may compete at some level, this ‘does not necessarily require that [they] be included in the relevant product market for antitrust purposes.’” (citation omitted)). The question is not whether there is *any* substitution but whether the products themselves are *reasonably* interchangeable. *Id.*; *see also Sysco*, 113 F. Supp. 3d at 26 (“[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.”); *FTC v. IQVIA Holdings Inc.*, 2024 WL 81232, at \*17 (S.D.N.Y. Jan. 8, 2024) (Competition for advertising dollars in a broader market of differing channels “does not necessarily mean those channels are reasonably interchangeable substitutes that must be included in the relevant product market.”).

Under *Brown Shoe*, the contours of a market can be determined by examining such factors as “industry or public recognition . . . , the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” 370 U.S. at 325. A relevant market “can exist even if only some of these factors are present.” *Staples*, 970 F. Supp. at 1075; *accord IQVIA*, 2024 WL 81232, at \*13, \*23–24. A product, moreover, can compete in multiple and concentric relevant markets. *Sysco*, 113 F. Supp. 3d at 48–49 (defining concentric markets); *Bertlesmann*, 646 F. Supp. 3d at 27–28 (“[E]ven if alternative submarkets exist . . . , or if there are broader markets that might be analyzed, the viability of such additional markets does not render the one identified by the government unusable.” (citations omitted)).

The hypothetical monopolist test, another market-definition tool, asks whether a

hypothetical monopolist of a product or group of products would find it profitable to raise price significantly above competitive levels or reduce quality significantly below competitive levels. U.S. Dep’t of Just. & Fed. Trade Comm’n, *Merger Guidelines* §§ 4.3.A–C (2023). A hypothetical monopolist test is not required to define a relevant product market. *See Meta Platforms*, 654 F. Supp. 3d at 912, 919 (“There is ‘no requirement to use any specific methodology in defining the relevant market.’ . . . As such, courts have determined relevant antitrust markets using, for example, only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and the [hypothetical monopolist test].” (citations omitted)). When a hypothetical monopolist test is applied, an economic expert may apply the test without constructing a formal econometric model. *See McWane, Inc. v. FTC*, 783 F.3d 814, 829–30 (11th Cir. 2015) (crediting testimony of an economic expert who had applied the hypothetical monopolist test using qualitative evidence rather than econometric analysis); Tr. 8386:25–8387:20 (Israel (Def. Expert)) (It is “more normal than not that [an expert] doesn’t do a full quantitative hypothetical monopolist test.”). Courts “routinely rely on qualitative economic evidence to define relevant markets.” *McWane*, 783 F.3d at 829 (citation omitted). Courts evaluate an expert’s testimony against the record as a whole to determine whether that testimony is “consistent with business realities.” *Sysco*, 113 F. Supp. 3d at 36–37; *see also IQVIA*, 2024 WL 81232, at \*30–31 (considering expert testimony in the context of the record as a whole).

Finally, product markets can be defined around products “where companies offer a product . . . for free but profit in other ways, such as by collecting consumer data or generating ad revenue.” *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 978 (9th Cir. 2023); *accord FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 45–46, 55 (D.D.C. 2022) (Services “provided free of charge” could qualify as a relevant product market.). In these cases, a monopolist may reduce

product quality or innovation below what would be expected in a competitive market. *See* Merger Guidelines § 4.3.B (Hypothetical monopolist test may entail worsening terms along any dimension of competition, including price, quality, product features, and innovative effort.).

## 2. Market-Definition Analysis Must Beware Of The *Cellophane* Fallacy

In Section 2 cases such as this one, where a firm has been operating as a monopolist for many years, courts must beware of the *Cellophane* fallacy—the existence of substitution between products resulting from monopoly power rather than reasonable substitutability. Phillip E. Areeda et al., *Antitrust Analysis: Problems, Text, and Cases* ¶ 350(b) (8th ed. 2021) (“[T]he existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power.”), *quoted favorably in Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 471 (1992). “At a high enough price, even poor substitutes look good to the consumer.” *United States v. Eastman Kodak Co.*, 63 F.3d 95, 105 (2d Cir. 1995) (citation omitted). That does not mean these poor substitutes belong in the relevant market, however. The test is whether the products are reasonable substitutes at competitive prices, not monopolized prices. Richard A. Posner, *Antitrust Law* 150 (2d ed. 2001).

Thus, a simple application of the hypothetical monopolist test or the practical indicia (e.g., sensitivity to price increases or other worsening of terms or quality) in a Section 2 case may yield misleading results because the monopolist’s conduct has warped substitution patterns. For example, when the cross-elasticity between two products is high, this may suggest that the two products belong in the same product market. *See* Merger Guidelines § 4.3. But cross-elasticity may also be high if customers facing a monopoly price choose poor substitutes instead of paying supracompetitive prices. *See* Posner, *Antitrust Law* 150. Under these circumstances, high cross-elasticity may be evidence of monopoly power rather than evidence that two products

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